No. 14-8913

In The
Supreme Court of the United States

SAUL MOLINA-MARTINEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

MARJORIE A. MEYERS
Federal Public Defender
SOUTHERN DISTRICT OF TEXAS
TIMOTHY CROOKS*
LAURA FLETCHER LEAVITT
Assistant Federal Public Defenders
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1669
(713) 718-4600
tim_crooks@fd.org
Counsel for Petitioner

**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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ARGUMENT

A CLEAR MISAPPLICATION OF THE SENTENCING GUIDELINES WARRANTS A REBUTTABLE PRESUMPTION THAT THE ERROR AFFECTED SUBSTANTIAL RIGHTS.

A. The Plain-Error Rule Is a "Fairness-Based Exception" to the Contemporaneous-Objection Rule and Allows for the Redress of "Obvious Injustice" even in the Absence of a Timely Objection.

Throughout its brief, the Government trumpets one theme, namely: the vindication of the contemporaneous-objection rule. The Government believes that, unless the plain-error rule is construed as narrowly as possible, the contemporaneous-objection rule will be set at naught, and the benefits of that rule lost.

No one disputes that the contemporaneous-objection rule is important. But even diligent attorneys and judges sometimes make mistakes, and "[t]he plain-error doctrine of Federal Rule of Criminal Procedure 52(b) tempers the blow of a rigid application of the contemporaneous-objection requirement." *United States v. Young*, 470 U.S. 1, 15 (1985) (footnote omitted). It does so in order "that obvious injustice [may] be promptly redressed," even in the absence of a timely objection. *United States v. Frady*, 456 U.S. 152, 163 (1982). In short, "the basic purpose of Rule 52(b) [is] the creation of a fairness-based exception to the general requirement that an objection be made at

trial." *Henderson v. United States*, 133 S. Ct. 1121, 1129 (2013) (citation omitted); *see also, e.g.*, *United States v. Escalante-Reyes*, 689 F.3d 415, 422 (5th Cir. 2012) (*en banc*) ("the purpose of plain error review in the first place is so that justice may be done") (citation omitted). In its focus on the contemporaneous-objection rule, the Government loses sight of that purpose of redress of "obvious injustice."

And there are few greater injustices than excess imprisonment. As the Tenth Circuit has written, "we can think of few things that affect an individual's substantial rights more than a reasonable probability an individual will linger longer in prison than the law demands only because of an obvious judicial mistake." *United States v. Sabillon-Umana*, 772 F.3d 1328, 1335 (10th Cir. 2014). In a related vein, this Court has held that, under the Sentencing Guidelines, ***any*** amount of excess imprisonment constitutes prejudice for purposes of the prejudice inquiry in a claim of ineffective assistance of counsel, *see Glover v. United States*, 531 U.S. 198, 203-04 (2001) – the same inquiry, this Court has held, as that required by the third prong of plain-error review. *See United States v. Dominguez Benitez*, 542 U.S. 74, 81-83 (2004).

The type of error at issue in this case – the application of an incorrect Guideline range – is peculiarly likely to result in the "obvious injustice" of excess imprisonment. As this Court has recognized, because of the continuing centrality of the Sentencing Guidelines to federal sentencing, the application of an erroneously high Guideline range is, by its nature,

likely to result in more imprisonment than a defendant would receive under the correct, lower range. *See Peugh v. United States*, 133 S. Ct. 2072, 2083-84 (2013). Yet, as lower courts have recognized, the particular effect of this type of error is peculiarly difficult to discern in a given case, especially when the district court believes that it is sentencing within the correct Guideline range.

For these reasons, in the unique and limited context of a forfeited error in the Guideline range applied to a defendant, "the rule of forfeiture should bend slightly," *United States v. Ross*, 77 F.3d 1525, 1539 (7th Cir. 1996), to avoid the "obvious injustice" of excess imprisonment, and courts should presume, subject to rebuttal, that the error affected the defendant's substantial rights. Such a modest presumption, applying to only one of the four components of the plain-error rule, fits comfortably into the Court's precedents and properly helps to avoid the injustice and unfairness of excess imprisonment.

B. The Government Misapprehends the Import of this Court's Plain-Error Precedents for the Question Presented.

Although the Government does discuss in its brief the Court's decision in *United States v. Olano*, 507 U.S. 725 (1993), and the Court's post-*Olano* plain-error cases, the Government's discussion of *Olano* is incomplete, and the Government overreads the Court's post-*Olano* plain-error cases.

1. ***Olano.***

In *Olano*, the Court not only recognized the possibility of satisfying the third prong of plain-error review by a presumption of prejudice, *see Olano*, 507 U.S. at 735, but also discussed at some length whether the error there qualified for such a presumption. *See id.* at 739-41. This careful consideration of whether a presumption of prejudice should be applied is at odds with the Government's dismissive treatment of such presumptions.

The Government is also off-base when it asserts that "the most logical interpretation of *Olano* is that only those errors that might, in constitutional analysis, warrant a presumption of prejudice could be so treated under Rule 52(b)." Resp. Br. 21 (citations omitted). If the Court had meant to limit the presumption of prejudice to certain constitutional errors, it presumably would have said so. Moreover, there would have been no reason to consider whether the ***nonconstitutional*** error at issue in *Olano* – a violation of Fed. R. Crim. P. 24(c) – warranted application of a presumption of prejudice. *See Olano*, 507 U.S. at 739-41.

Principally, however, the Government relies upon the following passage from *Olano*:

> When the defendant has made a timely objection to an error and [Federal] Rule [of Criminal Procedure] 52(a) applies, a court of appeals normally engages in a specific analysis of the district court record – a so-called

> "harmless error" inquiry – to determine whether the error was prejudicial. Rule 52(b) normally requires the same kind of inquiry, with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. In most cases, a court of appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial. This burden shifting is dictated by a subtle but important difference in language between the two parts of Rule 52: While Rule 52(a) precludes error correction only if the error "does ***not*** affect substantial rights" (emphasis added), Rule 52(b) authorizes no remedy unless the error ***does*** "affec[t] substantial rights."

Id. at 734-35 (internal citations omitted; emphasis in original). According to the Government, "[t]he possibility that courts could create such burden-shifting presumptions under Rule 52 itself would contradict *Olano*'s emphasis on the 'important difference' between the two subparts of Rule 52, under which the burden is 'shift[ed]' to the defendant under Rule 52(b) to show that a forfeited error affected his substantial rights." Resp. Br. 21 (citations and footnote omitted; brackets added by Government; further citation omitted); *see also* Resp. Br. 27-28.

The Government's reliance on this "important difference" language is misplaced. As an initial matter, it is not at all clear that "[p]etitioner's proposed presumption of prejudice [] would shift the burden

right back to the government." Resp. Br. 27 (citations omitted). Rather, *Olano* seems to contemplate that the presumption is simply an alternative way for the defendant to satisfy his burden of establishing an effect on substantial rights, subject to rebuttal by the Government.

In discussing whether a presumption of prejudice should apply to the error at issue in *Olano* (allowing alternate jurors to be present during jury deliberations, in violation of Fed. R. Crim. P. 24(c)), the Court pointedly noted that "a presumption of prejudice as opposed to a specific analysis does not change the ultimate inquiry: Did the intrusion affect the jury's deliberation and thereby its verdict?" *Olano*, 507 U.S. at 739. In other words, the Court not only aligned the presumption of prejudice with a case-specific analysis of prejudice, but it also made clear that, even with a presumption of prejudice, the "ultimate inquiry" is still whether the error affected the defendant's substantial rights – the same language as in Rule 52(b), which, the Court held, signaled that the defendant bore the burden of persuasion. *See id.* at 734-35. And the Court further suggested that a presumption of prejudice was simply an alternative way for defendants to satisfy their burden of showing an effect on substantial rights when the Court wrote: "The question, then, is whether the instant violation of Rule 24(c) prejudiced respondents, either specifically or presumptively." *Id.* at 739.

All of this is to say that the presumption of prejudice discussed in *Olano*, and argued for by petitioner

here, does not shift the burden of persuasion to the Government or elide the "important difference" between Rule 52(a) and Rule 52(b), as the Government argues. To the contrary, *Olano* suggests that the burden remains with the defendant, but it is, in a limited class of cases, open to the defendant to meet his burden by showing that he was prejudiced "either specifically or presumptively," *id.* – that is, in either a case-specific or a generalized way. *See also United States v. Marcus*, 560 U.S. 258, 270 (2010) (Stevens, J., dissenting) (observing that the relevant question is "whether the error in question affected substantial rights ***(either in a particular defendant's case or in the mine run of comparable cases)***") (emphasis added).

But even if a presumption of prejudice is conceptually viewed as shifting the burden of persuasion to the Government, rather than simply providing a defendant with an alternative method of meeting his burden of persuasion in a limited class of cases, the Court in *Olano* obviously did not believe that such burden-shifting was necessarily incompatible with its interpretation of Rule 52(b). In this regard, it is critical to note that the "important difference" passage from *Olano*, quoted above, was almost immediately followed by the Court's reference to the possibility of "a special category of forfeited errors that can be corrected regardless of their effect on the outcome," *Olano*, 507 U.S. at 735 – *i.e.*, structural errors – and then to "those errors that should be presumed prejudicial if the defendant cannot make a

specific showing of prejudice." *Id.* If the Court had meant, by the "important difference" passage, to establish an immutable rule that there could be no correction of forfeited errors without the defendant's demonstrating some prejudice, then there would have been no point in discussing nonexistent exceptions to that rule. In fact, the Government's "important difference" argument proves too much because it would scuttle not only *Olano*'s presumed-prejudice exception, but also its exception for structural errors.

That the Court did not want to establish such an immutable rule is perhaps best demonstrated, however, by the fact that the Court took pains to say only that ***"[i]n most cases***, a court of appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial." *Olano*, 507 U.S. at 734 (emphasis added). But "most cases" does not mean "all cases," and *Olano* thus pointedly left the door open to the possibility of defendants' satisfying the third prong by methods other than demonstrating case-specific prejudice.

2. The Court's Post-*Olano* Plain-Error Cases.

The Government correctly notes that, since *Olano*, the Court "has never again suggested that some category of errors might be presumptively prejudicial under Rule 52(b)," Resp. Br. 21 (footnote omitted), even though "the Court has continued to reserve the question whether structural errors might affect substantial rights regardless of their actual impact on an

appellant's trial." *Ibid.* (internal quotation marks and citations omitted). Rather, the Government notes, the Court's post-*Olano* plain-error cases have been resolved by (1) finding that the error in question was not structural, and (2) finding that the defendant had not met his burden of showing case-specific prejudice. *See* Resp. Br. 20-24. The implication is that the Court, without explicitly saying so, must have rejected the applicability of presumptions of prejudice.

That implication is incorrect. The fact that the Court did not mention the presumption of prejudice in any of those cases means only that the Court did not believe that those cases presented that issue. Those cases certainly do not represent a *sub silentio* repudiation of the Court's discussion of presumed prejudice in *Olano*. Thus, contrary to the Government's implication, *Olano*'s second exception to a specific showing of case-specific prejudice – namely, the exception for "errors that should be presumed prejudicial [even] if the defendant cannot make a specific showing of prejudice," *Olano*, 507 U.S. at 735 – remains "essentially in the same place [it] w[as] after *Olano*." Brent Ferguson, *Plain Error Review and Reforming the Presumption of Prejudice*, 44 N.M. L. Rev. 303, 309 (2014).

Nevertheless, the Government claims to glean from the Court's post-*Olano* cases "two principles that suffice to resolve this case." Resp. Br. 24. First, invoking language from *Marcus*, the Government asserts that "when a non-structural error 'come[s] in various shapes and sizes' and creates varying 'degree[s] of

harm,' Rule 52(b) requires the party that forfeited the claim of error to make 'a showing of individual prejudice.'" Resp. Br. 24-25 (citations omitted; brackets added by Government). Second, says the Government, "when a 'procedural error[ ] at sentencing' is 'amenable' to review for harmlessness, Rule 52(b) holds the defendant to his 'usual burden of proving prejudice.'" Resp. Br. 25 (citation omitted; brackets added by Government).

As an initial matter, the Court did not, in making these statements, purport to be setting forth broad-ranging "principles" for plain-error review generally, much less for the particular question presented here. Indeed, these statements were made in the context of cases which, as discussed above, did not discuss the presumption of prejudice at all, but focused only on the distinction between structural errors and errors for which a conventional prejudice inquiry was indicated. Viewed in that context, the relevance of those statements to the question presented here is questionable. In any event, those statements do not support the application of the Government's "two principles" in this case.

First, the type of error discussed in *Marcus* – a jury-instruction error – was accurately described as "com[ing] in various shapes and sizes," with varying "kind[s] and degree[s] of harm." *Marcus*, 560 U.S. at 265. This is so for two reasons: (1) a jury instruction can deal with all sorts of different things (*e.g.*, procedural matters like taking notes, avoiding publicity, or the burden of proof, or substantive matters, like the

elements of a crime or components of a defense); and (2) a trial has many moving parts, and innumerable factors can make an erroneous jury instruction harmful in one case, but harmless in another – *e.g.*, the weight and strength of the evidence, the Government's theory of prosecution, and the parties' arguments to the jury.[1]

The application of an erroneous Guideline range is not like these other types of errors. The application of an erroneous Guideline range is a category of error that does not come in various shapes and sizes. Although an erroneous Guideline range may result from the misapplication of numerous different Guideline provisions, it is a single error that generally produces a single harm – a sentence greater than it would have been under the correct Guideline range. Put another way, unlike the multifarious categories of errors discussed in the Court's previous third-prong

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[1] The same is true of the errors at issue in *Olano* (an impermissible intrusion upon the jury), and *Jones v. United States*, 527 U.S. 373 (1999) (a jury-instruction error in the penalty-phase of a federal capital case). It is also true of the error at issue in *Puckett v. United States*, 556 U.S. 129 (2009), because (1) a plea agreement can involve all sorts of diverse promises by the Government, and (2) the breach of a plea agreement may have widely varying effects upon a defendant, depending upon the obligation that was breached. It is also true of the error at issue in *Dominguez Benitez* because (1) Federal Rule of Criminal Procedure 11 has a substantial number of different advisements required for a guilty-pleading defendant, and (2) the effect of an omission of any one or more of those pieces of advice will vary widely, depending on the circumstances of the particular case.

cases, the error of using the wrong Guideline range is a monolithic error that is uniquely likely to have an effect on the outcome of the proceeding. Indeed, it is difficult to imagine any other type of error that is so likely to have an effect on the outcome.[2]

With respect to the second of the Government's "two principles," no one doubts that Guideline-range errors, like most non-structural errors, are sometimes "amenable" to conventional prejudice analysis. The problem is that often Guideline-range errors are not amenable to such analysis because (for institutional reasons discussed in petitioner's opening brief, *q.v.* at 38-43, and below) the record will often not reflect how the Guideline range factored into the district court's decision. That reality, coupled with the reality that the application of the wrong Guideline range likely ***does*** affect the district court's sentencing decision, are the principal reasons why the Court should endorse the presumption of prejudice adopted by the Third and Tenth Circuits.

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[2] To the extent that the Government appears to rely (*see* Resp. Br. 25) on the differing "degrees" of Guideline-range error – *i.e.*, the extent, great or small, to which the sentence diverges from the correct Guideline range – that reliance is misplaced in light of the Court's decision in *Glover*, 531 U.S. at 203-04, which made clear that ***any*** amount of excess imprisonment constitutes prejudice for purposes of the prejudice inquiry in a claim of ineffective assistance of counsel (the same inquiry as that required by the third prong of plain-error review, *see Dominguez Benitez*, 542 U.S. at 81-83).

C. The Use of an Erroneous Guideline Range Is an Appropriate Circumstance for Application of a Rebuttable Presumption of Prejudice.

1. Introduction.

As noted above, whether the presumption of prejudice referred to in *Olano* is simply an alternative means for a defendant to meet his burden of showing prejudice (as *Olano* suggests), or whether (as the Government would have it) it represents a formal shifting of the burden of persuasion, the Government has not pointed to anything in the Court's cases since *Olano* that rules out such a presumption. And, as petitioner discussed in his opening brief, *q.v.* at 26-30, a rebuttable presumption of prejudice is appropriate in a criminal case where (1) the "natural effect" of a particular type of error is to affect a defendant's substantial rights (*i.e.*, where empirical evidence and experience suggest that a particular type of error is, across the board, likely to have an effect on the outcome), *see Shinseki v. Sanders*, 556 U.S. 396, 411 (2009); *Kotteakos v. United States*, 328 U.S. 750, 765-66 (1946),[3] and (2) the nature of the error makes it

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[3] Although the Government disputes the relevance of *Kotteakos* to the question presented here, *see* Resp. Br. 32 n.6, the fact is that the Court has more than once relied upon *Kotteakos* in construing the third, "affects substantial rights" prong of Rule 52(b). *See Dominguez Benitez*, 542 U.S. at 81; *Olano*, 507 U.S. at 734. And, although *Kotteakos* dealt with preserved error rather than forfeited error, *Olano* makes clear that the "affects substantial rights" inquiry is the same under Rule 52(b) (plain error) as

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likely that "the defendant cannot make a specific showing of prejudice." *Olano*, 507 U.S. at 735.

This two-part test, grounded in this Court's cases and applied by lower courts, provides a workable test for when courts should apply the presumption of prejudice referred to in *Olano*. The two parts of that test, properly understood, constitute meaningful limiting principles that will make such presumptions rare and will not upset Rule 52(b)'s "careful balancing" of the need to encourage contemporaneous objections "against [the] insistence that obvious injustice be promptly redressed." *Frady*, 456 U.S. at 163 (footnote omitted).

2. The "Natural Effect" of the Use of an Erroneously High Guideline Range Is Excess Imprisonment.

The first part of the two-part test for application of a presumption of prejudice is whether empirical evidence and experience lead the courts to conclude that the "natural effect" of a particular type of error is to affect a defendant's substantial rights. Although the Government asserts that "[t]he courts of appeals to adopt a presumption of prejudice for Guidelines errors [] have not done so based on those criteria," Resp. Br. 35, that assertion is incorrect. Both the Third Circuit and the Tenth Circuit, after surveying

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it is under Rule 52(a), except for the question of who bears the burden of showing that effect. *See Olano*, 507 U.S. at 734-35.

the jurisprudence of the federal courts of appeals (perhaps the best source of "empirical evidence" and "experience" on this point), concluded that the natural effect of a Guideline error is to affect the sentence. *See Sabillon-Umana*, 772 F.3d at 1333-34; *United States v. Knight*, 266 F.3d 203, 207-09 (3d Cir. 2001).

Moreover, the Government admits that "Sentencing Commission data indicate that the Guidelines continue to play a central role in federal sentencing, as they must in a system that treats them as the 'starting point' in every sentencing." Resp. Br. 36 (citing *Peugh*, 133 S. Ct. at 2083 & 2084). The Government then omits further discussion of *Peugh*, however,[4] and proceeds to critique petitioner's informal survey of overlapping-range plain-error cases on the ground that the overwhelming trend shown by that survey – namely, that a lower Guideline range on remand is associated with a lower sentence on remand – may be attributable to other factors. *See* Resp. Br. 36-37. From this, the Government concludes that "[t]he empirical evidence sheds little reliable light on the 'natural effect' of Guidelines errors as a category." Resp. Br. 37.

The Government, however, ignores the fact that, in *Peugh*, the Court agreed that there was "considerable empirical evidence indicating that the Sentencing

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[4] The Government likewise does not respond at all to petitioner's discussion of the unique "anchoring" effect of the Sentencing Guidelines. *See* Pet. Br. 36-37 n.15.

Guidelines have the intended effect of influencing the sentences imposed by judges." *Peugh*, 133 S. Ct. at 2084. This consideration – along with the Court's recognition of the systemic primacy of the Guidelines even after *United States v. Booker*, 543 U.S. 220 (2005), *see Peugh*, 133 S. Ct. at 2083-84 – led the Court to conclude that "[a] retrospective increase in the Guidelines range applicable to a defendant creates a sufficient risk of a higher sentence to constitute an *ex post facto* violation." *Id.* at 2084.

In sum, (1) *Peugh*, (2) the available empirical evidence, and (3) the accumulated experience of the numerous federal appellate courts that have, explicitly or implicitly, presumed prejudice from the application of an erroneously high Guideline range, all support the conclusion that the "natural effect" of that error is to skew the sentence higher. To the extent that the Government demands more certainty about this "natural effect" than these sources provide, the Government's demand is inconsistent with this Court's pronouncement that the third prong of plain-error review requires only a "reasonable probability" of a different result, *see Dominguez Benitez*, 542 U.S. at 83 – a standard that "is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." *Id.* at 83 n.9 (citation omitted).

3. The Difficulty, in a Typical Case, of Showing the Effect of an Erroneous Guideline Range on the Sentence Ultimately Imposed also Counsels in Favor of a Rebuttable Presumption of Prejudice.

The Government also argues that there is no special difficulty in discerning the effect of an erroneous Guideline range on the sentence ultimately imposed. *See* Resp. Br. 39-43. The Government first asserts that in some instances, it may be clear that such an error was or was not harmless. *See* Resp. Br. 40-41. Petitioner does not dispute that proposition, *see* Pet. Br. 44-45 n.18, but it does not mean that a presumption is not appropriate as a general matter. *See Sabillon-Umana*, 772 F.3d at 1334.

The Government hypothesizes that defendants will often be able to make a showing of harm from Guideline-range error from "the array of information that is routinely developed during" the federal sentencing process, and from "whether the judge ultimately chose a within-range sentence, where in the range the sentence fell, and whether the judge structured any other aspect of the sentence to ensure a particular term of imprisonment." Resp. Br. 41 (citations omitted). However, almost all of those things were present in the instant case, but neither the Fifth Circuit, nor the Government in its brief, *q.v.* at 52, found them adequate to establish prejudice.

The Government also seems to believe that explanations for within-Guideline sentences are much

more extensive than they generally are. *See* Resp. Br. 42-43. As noted in petitioner's opening brief, *q.v.* at 38-41, however, where a district court sentences within what it believes to be the Guideline range, generally little or no explanation is required – and the instant case is a textbook example of that principle. And, even where a defendant argues for a sentence outside the Guideline range (here petitioner did not), any explanations for rejecting those arguments are unlikely to shed any light on the very different question of what the district court would do if it were confronted with a different Guideline range.

Finally, it is telling that two circuits – the Third and the Tenth – have explicitly concluded that "absent a fortuitous comment by the sentencing judge on the record, it is very difficult to ascertain the impact of [a Guideline-application error]." *Knight*, 266 F.3d at 207; *see also Sabillon-Umana*, 772 F.3d at 1333-34. This conclusion, undoubtedly drawn from "empirical evidence" (countless sentencing transcripts and records) and "experience" (those courts' review of those transcripts and records), is entitled to respect, and is not contradicted by any other circuit.[5]

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[5] Indeed, it seems likely that the same conclusion may underlie the implicit presumption of prejudice applied by other circuits.

4. A Rebuttable Presumption of Prejudice Better Respects the Primacy of the District Court's Role in Sentencing.

It is also worth highlighting that a sentence within the correctly calculated Guideline range may be (and in many circuits is) presumed to be substantively reasonable, because of the double assurance conferred by the concordance between the sentence recommended by the expertise of the Sentencing Commission and the sentence selected by the sentencing judge. *See Rita v. United States*, 551 U.S. 338, 347-51 (2007). The corollary to this unusual presumption of reasonableness, however, is that when the sentence is imposed without the benefit of the ***correct*** Guideline range, and thus without the correct expert advice of the Sentencing Commission, appellate courts should be especially loath to assume that knowing the correct range would have made no difference in the district court's sentence.

In a related vein, over 20 years ago, the Court rejected the notion that a sentence could be affirmed, even in the face of an acknowledged error in the Guidelines, simply because the appellate court deemed the sentence to be reasonable; rather, said the Court, the appellate court must be sure that the district court would have imposed the same sentence even in the absence of the error. *See Williams v. United States*, 503 U.S. 193, 201-05 (1992). Along the way, the Court stressed that "[t]he selection of the appropriate sentence from within the guideline range, as well as the decision to depart from the range in

certain circumstances, are decisions that are left solely to the sentencing court," *id.* at 205 (citation omitted), and that "it is the prerogative of the district court, not the court of appeals, to determine, in the first instance, the sentence that should be imposed in light of certain factors properly considered under the Guidelines." *Id.*

Especially given the unique centrality of the Guidelines, *see Peugh*, 133 S. Ct. at 2083-84, even where an error in the calculation of the Guideline range has been forfeited, a presumption of prejudice better respects "the prerogative of the district court to determine, in the first instance, the sentence that should be imposed in light of [the correct Guideline range]." *Williams*, 503 U.S. at 205. Because the Guidelines generally do make a difference to a district court's sentences, it is appropriate, and more respectful of the institutional role of the district court, to presume that a mistaken range did make a difference and then to remand to the district court to reassess the sentence in light of the correct range – unless, of course, the record clearly shows no reasonable probability that the mistaken range affected the sentence.[6]

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[6] The Government argues that this role could be honored by a contemporaneous objection, which would allow the district court to address the Guideline error and determine the effect of that error in the first place, without the need for an appeal. *See* Resp. Br. 49. Of course it could, but that is not the point here. The point, rather, is this: because a Guideline-range error is,

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5. The Proposed Presumption of Prejudice Will Not Upset Rule 52(b)'s "Careful Balancing" of Interests.

The Government contends that the proposed presumption of prejudice "can only weaken counsel's incentive to scrutinize the Probation Office's Guidelines calculations and make timely objections," Resp. Br. 45 (citation omitted), which, the Government asserts, "are particularly essential in the context of federal sentencing . " Resp. Br. 46 (citations omitted).[7] The Government further claims that "petitioner's presumption makes it easier to reverse on plain-error review than on harmless-error review, resulting in a windfall for the non-objecting defendant." Resp. Br. 44 (internal quotation marks and citation omitted).

The Government's arguments are without merit. Even if, in some cases at the margins, it will be harder for the Government to show that an unobjected-to Guideline error was harmless, failure to object still subjects a defendant to two significant obstacles to relief. First, unlike the case where a timely objection is made, a defendant cannot receive appellate relief

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across the board, peculiarly likely to affect the sentence imposed, an appellate court that nevertheless assumes that such an error would make no difference in the sentence is treading dangerously close to usurping the district court's sentencing function.

[7] The Government apparently does not dispute petitioner's contention that "sandbagging" – *i.e.*, the strategic withholding of an objection below – is unlikely to be a concern for this type of error. *See* Pet. Br. 50-51.

for an unobjected-to Guideline error unless he shows that the error is "plain," *i.e.*, "clear or obvious, rather than subject to reasonable dispute." *Puckett*, 556 U.S. at 135 (citation omitted). Second, even where the first three prongs of plain-error review are satisfied, under the fourth prong of plain-error review, correction of the error remains discretionary, with that discretion "to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (internal quotation marks, brackets, and citations omitted).

These requirements provide plenty of incentive to make objections because they do make securing relief on plain-error review much more difficult. *Cf. Henderson*, 133 S. Ct. at 1130 (noting the "screening" function performed by the second and fourth prongs of plain-error review). Courts have, with some frequency, declined to reverse Guideline-application errors on plain-error review either because the error was not "plain,"[8] or because the case did not meet the fourth prong of plain-error review.[9] And, although the Government fears that the courts of appeals will misapply the fourth prong, *see* Resp. Br. 48, that fear runs counter to this Court's recognition that lower

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[8] *See, e.g.*, *United States v. Jasso*, 587 F.3d 706, 713 (5th Cir. 2009) (finding Guideline error, but finding that the error was not "plain" "[b]ecause until now the error has been anything but obvious").

[9] *See, e.g.*, *United States v. Duque-Hernandez*, 710 F.3d 296, 298-99 (5th Cir.), *cert. denied*, 134 S. Ct. 450 (2013).

courts "are presumed to know the law and to apply it in making their decisions." *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002).

A final point must be made. In the more than 20 years since *Olano*, the lower federal appellate courts have been remarkably restrained in their deployment of presumptions of prejudice. As set out in petitioner's opening brief, *q.v.* at 29-30 & n.11, the courts of appeals have identified only four classes of errors qualifying for a presumption. But, by far the most prevalent of these presumptions is the explicit or implicit presumption that an error in the application of the Sentencing Guidelines affects a defendant's substantial rights.[10] *See* Pet. Br. 29-30 & n.12. The fact that a presumption of prejudice, though generally so rare, has so overwhelmingly been used in the context of Guideline-application errors, speaks volumes. It shows that lower federal courts, drawing upon their considerable experience, have concluded that (1) Guideline-application errors, perhaps more than any other type of error, are uniquely likely to affect the outcome of the proceedings, but (2) it is also uniquely difficult to demonstrate that effect in many cases. It also suggests that the lower courts have

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[10] In a decision rendered after petitioner's opening brief was filed, even the Fifth Circuit acknowledged that it applies a presumption of prejudice to Guideline-range errors not resulting in overlapping ranges. *See United States v. Putnam*, 806 F.3d 853, 855-56 & n.2 (5th Cir. 2015).

concluded that such a presumption is necessary to ensure "that obvious injustice [may] be promptly redressed," even in the absence of a timely objection. *Frady*, 456 U.S. at 163. This Court should reach the same conclusions, and should adopt a rebuttable presumption that a Guideline-range error affected a defendant's substantial rights.

D. Even if the Court Does Not Adopt a Presumption of Prejudice, the Court Should Reverse the Judgment Below.

As petitioner explained in his opening brief, *q.v.* at 53-54, even if the Court does not adopt a presumption of prejudice, the Court should still conclude, contrary to the Fifth Circuit, that petitioner has shown at least a reasonable probability of a lower sentence under the correct Guideline range. The Government claims that the question of case-specific prejudice is not "fairly included" in the question presented in the petition for certiorari because "[i]t is [] not the type of argument that the Court has reached in cases granted to resolve which legal standard applies in the first place." Resp. Br. 50 (citation omitted). But, in fact, the Court has sometimes gone on to decide the merits of a lower-court judgment even after resolving the question presented against the petitioner.[11] In any

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[11] *See, e.g.*, *Alaska Dep't of Environmental Conservation v. Environmental Protection Agency*, 540 U.S. 461, 496 (2004) (holding that the question presented – whether the EPA had authority over a matter – embraced the case-specific issue of

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event, the Court has the power to address issues that were neither "fairly included" in the question presented nor presented in the court of appeals. *See, e.g.*, *Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980). Here, the issue was presented in, and decided by, the Fifth Circuit, and its resolution by this Court would provide useful guidance to the lower courts. Therefore, even if the Court does not agree that a presumption of prejudice is warranted, the Court should still decide whether petitioner has made a sufficient showing of case-specific prejudice.

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whether, assuming the EPA had the authority, it had abused that authority); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 853-58 (1982); *see also id.* at 859 (White, J., concurring in the result) (observing that the Court had granted certiorari to review the legal standard used by the court of appeals, but, after implicitly endorsing that standard, had then reversed on the ground that the court of appeals had misapplied the clearly-erroneous rule by "setting aside factual findings that were not clearly erroneous," which was not "fairly included" in the question presented).

CONCLUSION

The judgment of the United States Court of Appeals should be reversed.

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
SOUTHERN DISTRICT OF TEXAS
TIMOTHY CROOKS*
LAURA FLETCHER LEAVITT
Assistant Federal Public Defenders
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1669
(713) 718-4600
tim_crooks@fd.org
Counsel for Petitioner

**Counsel of Record*